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Counterdefendant EVAN WEAVER*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

EVAN WEAVER,

Plaintiff,

vs.

TAMPA INVESTMENT GROUP, LLC,
HALCYON CABOT PARTNERS LTD.,
FELIX INVESTMENTS, LLC, and JOHN
BIVONA,

Defendants.

TAMPA INVESTMENT GROUP, LLC,

Counterclaimant,

vs.

EVAN WEAVER, and DOES 1-50, inclusive,

Counterdefendants.

Case No. CV-12-01117 EJD (PSG)

**DECLARATION OF BRYAN M. PAYNE
IN SUPPORT OF PLAINTIFF'S MOTION
TO COMPEL ADDITIONAL
DOCUMENTS FROM DEFENDANTS
FELIX INVESTMENTS, LLC, AND JOHN
BIVONA**

Date: February 3, 2015
Time: 10:00 a.m.
Dept.: Courtroom 5, 4th Floor
Judge: Hon. Paul Singh Grewal

1 I, BRYAN M. PAYNE, declare as follows:

2 1. I am an attorney duly admitted in the Northern District of California and am an
3 associate with the law firm of Cotchett, Pitre & McCarthy, LLP, attorneys for Plaintiff and
4 Counterdefendant Evan Weaver (“Plaintiff” or “Weaver”) in this matter. I make this declaration
5 in support of Plaintiff and Counterdefendant’s Motion to Compel Additional Documents from
6 Defendants Felix Investments, LLC, and John Bivona. I make this declaration based upon my
7 own personal knowledge, and if called upon to testify as a witness, I could and would competently
8 testify thereto.

9 2. After initial discovery from Defendant Tampa Investment Group, LLC, Plaintiff
10 amended his complaint on December 20, 2012, to add Felix Investments, LLC, a brokerage firm
11 that negotiated Plaintiff’s deal behind the scenes, John Bivona, an attorney for Tampa and a
12 principal at Felix, and Halcyon Cabot Partners Ltd., the firm that brokered the transaction at issue
13 in this case between Plaintiff, the seller, and Tampa, the buyer.

14 3. On May 10, 2013, Plaintiff served requests for production of documents on
15 Defendant Bivona and Defendant Felix. Attached hereto as **Exhibit A** and **Exhibit B** are true
16 and correct copies of Plaintiff’s First Request for Production of Documents to Defendant Felix
17 Investments, LLC and Plaintiff’s First Request for Production of Documents to Defendant John
18 Bivona, respectively (collectively, the “Document Requests”).

19 4. Defendants responded to the Document Requests on June 17, 2013, making
20 blanket objections to each and every request and refusing to produce even one category of
21 documents. Attached hereto as **Exhibit C** and **Exhibit D** are true and correct copies of Response
22 of Defendant Felix to Plaintiff Weaver’s First Request for Production of Documents and
23 Response of John Bivona to Plaintiff Weaver’s First Request for Production of Documents,
24 respectively.

25 5. On July 31, 2013, our former co-counsel in this matter, Mr. Thomas H. Carlson,
26 wrote a letter to Joseph S. Leventhal of the Leventhal Law Firm, APC, counsel for Defendants
27 Felix and Bivona. The letter outlined the discovery failures of Felix and Bivona, specifically
28 mentioning the months overdue initial disclosures. Attached hereto as **Exhibit E** is a true and

1 correct copy of the letter from Mr. Carlson to Mr. Leventhal, dated July 31, 2013.

2 6. Felix and Bivona eventually filed their initial disclosures on August 27, 2013.
3 Attached hereto as **Exhibit F** and **Exhibit G** are true and correct copies of Felix's Initial
4 Disclosure and Bivona's Initial Disclosure, respectively.

5 7. On August 29, 2013, Mr. Carlson again wrote to Mr. Leventhal asking for the
6 documents identified in Felix and Bivona's initial disclosure that were not produced. Mr. Carlson
7 also points out the boilerplate objections in Defendants' Document Responses which Defendants
8 use as a basis to not produce any documents. Attached hereto as **Exhibit H** is a true and correct
9 copy of the letter from Mr. Carlson to Mr. Leventhal, dated August 29, 2013.

10 8. On January 15, 2014, Felix produced 77 pages of documents bates-stamped
11 FELIX_00001 – FELIX_00077.

12 9. On February 28, 2014, Mr. Carlson again wrote to Mr. Leventhal to meet and
13 confer in regard to Plaintiff's Document Requests. He stated "while I acknowledge getting the
14 long-awaited teeth-pulling production on January 15, 2014, that production was obviously
15 insufficient and seemed to consist only of documents forwarded by David King and documents
16 from us, and which we already had." Attached hereto as **Exhibit I** is a true and correct copy of
17 the letter from Mr. Carlson to Mr. Leventhal, dated February 28, 2014.

18 10. Defendants supplemented their responses to Plaintiff's Document Requests on
19 March 17, 2014. For many of the supplemental responses Defendants indicated that they would
20 do a diligent search for all non-privileged documents after the Court ruled on the pending
21 Motions to Dismiss. Attached hereto as **Exhibit J** and **Exhibit K** are true and correct copies of
22 Defendant Felix's Supplemental Responses to Plaintiff's First Set of Request for Production of
23 Documents and Defendant Bivona's Supplemental Responses to Plaintiff's First Set of Request
24 for Production of Documents, respectively.

25 11. On April 1, 2014, the Court denied Defendants' Motions to Dismiss in their
26 entirety. *See* Order at Dkt. 104.

27 12. On April 8, 2014, Mr. Carlson again wrote Mr. Leventhal as a follow-up regarding
28 the supplemental responses and document production, or lack thereof more specifically. He

1 reminded Mr. Leventhal of Defendants' position to produce documents should the Court deny the
2 Motions to Dismiss, which it did. He points out that many blanket objections are still asserted in
3 the supplemental responses. Attached hereto as **Exhibit L** is a true and correct copy of Mr.
4 Carlson's letter to Mr. Leventhal, dated April 8, 2014.

5 13. Mr. Leventhal responded on April 18, 2014, suggesting to meet and confer on
6 outstanding discovery requests after Defendants identify, collect, and produce additional
7 documents responsive to Plaintiff's Request. Attached hereto as **Exhibit M** is a true and correct
8 copy of Mr. Leventhal's letter to Mr. Carlson, dated April 18, 2014.

9 14. While Plaintiff waited for Defendants Felix and Bivona's document production,
10 Defendant Halcyon Cabot Partners Ltd. then filed a Motion to Compel Arbitration on or around
11 May 2014. The Court denied this Motion on September 23, 2014.

12 15. The parties then agreed to attend a mediation session on October 23, 2014, where
13 no agreement was reached.

14 16. The deposition of Mr. Bivona and Felix (for which Mr. Bivona was the authorized
15 representative) took place on December 4, 2014. At his deposition Mr. Bivona indicated that he
16 did in fact produce communications with potential investors of Plaintiff's Twitter shares to his
17 counsel for review. Attached hereto as **Exhibit N** is a true and correct copy of excerpts from
18 John Bivona's deposition transcript, dated December 4, 2014.

19 17. The following day, I followed up with Mr. Leventhal regarding the issue of
20 document production and reiterated that the Court's ruling on the Motion to Dismiss had long
21 passed. Attached hereto as **Exhibit O** is a true and correct copy of the letter from myself to Mr.
22 Leventhal, dated December 5, 2014.

23 18. Mr. Leventhal responded that same day via email asserting that the delay in
24 producing the documents does not have to do with the decision on the Motions to Dismiss but
25 rather based on the objections, contrary to what his April 18 later stated. Mr. Leventhal then
26 stated that Plaintiff had never asked to meet and confer, even though Mr. Carlson had attempted
27 to do so numerous times but Mr. Leventhal suggested to postpone meet and confer and resolve
28 deficiencies in discovery responses until after Felix produced additional documents. Attached

1 hereto as **Exhibit P** is a true and correct copy of the email from Mr. Leventhal to myself, dated
2 December 5, 2014.

3 19. After a meet and confer call, Defendants agreed to produce additional documents.
4 Documents bates stamped FELIX_00078 – FELIX_00284 were produced to Plaintiff on
5 December 15, 2014, the day of the discovery cutoff. This document production consisted of only
6 eight documents. Attached hereto as **Exhibit Q** is a true and correct copy of the email from Ms.
7 French attaching the document production, dated December 15, 2014. Of those eight documents,
8 two were articles from online, easily accessible to Plaintiff, and one was a list of handwritten
9 investor names previously produced to Plaintiff by Defendant Tampa. As well, one of the
10 aforementioned internet articles appears to have been accessed December 8, 2014.

11 20. On December 16, 2014, I wrote a letter to Mr. Leventhal asking for confirmation
12 as to whether all non-privileged documents in the custody of Defendants Felix and Bivona's
13 custody had been produced. Mr. Leventhal responded via email asking if this could be discussed
14 at the deposition on Friday, December 19, 2014, despite the fact that the Motion to Compel
15 deadline was approaching. Attached hereto as **Exhibit R** and **Exhibit S** are true and correct
16 copies of my letter to Mr. Leventhal and Mr. Leventhal's email response, respectively.

17 21. On December 18, 2014, I wrote a letter to Jennifer M. French, an associate of Mr.
18 Leventhal, highlighting the deficiencies in this long-awaited production. In my letter I
19 summarized how many meet and confer letters Mr. Carlson sent and how many months he
20 patiently waited for documents. I also pointed to the grossly deficient 284-page document
21 production and highlighted how many categories of documents Plaintiff had requested that had
22 not been produced. Attached hereto as **Exhibit T** is a true and correct copy of my letter to Ms.
23 French, dated December 18, 2014.

24 22. Ms. French responded that day and asserted that Mr. Leventhal had offered to
25 meet and confer in his April 18 letter, which is false, as that letter stated "we believe it would be
26 prudent to postpone meeting and conferring on the outstanding requests until we have completed
27 our review and produced additional responsive documents." Ms. French then indicated that the
28 reason for lack of production was because of Hurricane Sandy which devastated their offices and

1 she offered to meet and confer regarding the Document Requests. Attached hereto as **Exhibit U**
2 is a true and correct copy of Ms. French's letter to myself, dated December 18, 2014.

3 23. On December 19, 2014 I met and conferred with Ms. French via telephone. She
4 agreed that Defendants would produce additional documents that are non-privileged and were not
5 destroyed by Hurricane Sandy. Plaintiffs are agreeable to waiting for Defendants to conduct a
6 review of their documents. If Defendants produce adequate documents that are responsive to
7 Plaintiff's categories of requests, Plaintiff will withdraw this motion.

8 24. Plaintiff, however, does not wish to allow the deadline for filing of motions to
9 compel to pass and allow Defendants to produce a once again scarce document production.

10 I declare under penalty of perjury under the laws of the United States of America
11 that the foregoing is true and correct to the best of my knowledge. Executed this 22nd day of
12 December 2014, at Burlingame, California.

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15 /s/ Bryan M. Payne
16 BRYAN M. PAYNE
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